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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D. C. 20536

File: EAC 01 227 57042

Office: Vermont Service Center

Date: FEB 24 2003

IN RE: Petitioner:

Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a residential home improvement company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is December 27, 2000. The beneficiary's salary as stated on the labor certification is \$17.44 per hour or \$36,275.20 per annum.

Counsel initially submitted a copy of the petitioner's 2000 Form

1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The Form 1040 reflected an adjusted gross income of \$11,325. Schedule C reflected gross receipts of \$402,794; gross profit of \$402,794; wages of \$48,150; and a net profit of \$12,186.

On October 5, 2001, the director requested additional evidence of the petitioner's ability to pay the proffered wage, to include a copy of the petitioner's Form 941, Employer's Quarterly Tax Return, for the first and second quarters of calendar year 2001, and a copy of Form W-3, Transmittal of Wage and Tax Statements for tax year 2000.

In response, counsel submitted copies of checks paid to the beneficiary from January to October 2001, a copy of an unaudited financial statement for the petitioner for the period ended September 30, 2001, and a copy of the beneficiary's W-2 Wage and Tax Statement which shows he was paid \$20,760.00 in 2000.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the beneficiary's W-2 Wage and Tax Statement which shows he was paid \$35,604.00 in 2001.

As noted by the director:

The petitioner must demonstrate the ability to pay the proffered wage at the time the priority date is established. The 2000 federal tax return indicates an adjusted gross income of \$11,325.00. The beneficiary's 2000 Form 1099-Misc indicates payment of \$20,760.00. However, the combined amounts do not equal the required wage on the labor certification.

In addition, the petitioner has not paid the full wage to the beneficiary in 2001, and has submitted no evidence of its ability to pay the difference.

Accordingly, after a review of the federal tax return for 2000, the year of filing of the petition, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.